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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1994

No. 94-1889

Supreme Court, U.S.
FILED
JUN 14 1995
OFFICE OF THE CLERK

GAETANO MIELE and DOROTHY MIELE, husband and wife; MARGUERITE CHERIPKA, Individually and on behalf of the Estate of James Cheripka,

Petitioners,

v.

PERINI CORPORATION, MERIDIAN MORTGAGE CORPORATION, STEVENS & WILKINSON, INC., ATLANTIC PALACE CONDOMINIUM ASSOCIATION, AND METALAN ERECTORS, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

Brief of Respondent, Meridian Mortgage Corporation, in Opposition To Petition For A Writ Of Certiorari

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QUESTIONS PRESENTED FOR REVIEW

Questions 1, 2, 3a and 3c presented in the Petition were not raised in the Court of Appeals for the Third Circuit or the District of New Jersey. Compare the Statement of Issues in Petitioners' Brief filed in the Third Circuit, a copy of which is attached to this Brief at Supplemental Appendix, page 1B, and the decision of the District of New Jersey at pages 5A-40A of the Appendix to Petition for Writ of Certiorari. As set forth below, the writ should be denied on those Questions, since they have been waived.

The only Question properly before this Court is:

Did the Court of Appeals for the Third Circuit correctly find that the District of New Jersey properly granted summary judgment against the Petitioners/intervenors because they failed to proffer necessary expert

testimony in support of their claims of construction and design defects?

LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT OF APPEALS FOR THE THIRD CIRCUIT AND THE DISTRICT OF NEW JERSEY.

While Meridian Mortgage Corporation ("Meridian") is listed as a Respondent in the caption chosen by Petitioners and in their list of parties, it was not a party in Petitioners' intervenor complaint styled Portagallo, et al. v. Perini Corporation and Stevens and Wilkinson, Inc. and filed in the District of New Jersey with Wright, et al. v. Perini Corp., et al., Civil No. 90-189. See Appendix to Petition for Writ of Certiorari, pages 14A-17A. Meridian was not named as a defendant in the Wright case, but was joined as a fourth party defendant by third party defendants joined by defendants Perini Corp. and Stevens & Wilkinson, Inc. Nevertheless, the plaintiffs in Wright, including Petitioners, Gaetano and Dorothy

Miele, and the other Petitioners made no claims against Meridian.*

Meridian is a wholly owned subsidiary of Meridian Bank, a publicly held bank holding company located in the Commonwealth of Pennsylvania.

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* Petitioners erroneously include U.S. Capital Corporation, First Resorts of New Jersey, Inc., John Doe, XYZ Corporation and other unnamed parties as defendants in the Wright case. In fact, none of those entities or individuals was named as a defendant in the Wright case or in any other case consolidated with Wright or in the intervenor complaint.

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Brief of Respondent, Meridian Mortgage Corporation, in Opposition To Petition For A Writ Of Certiorari

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Respondent, Meridian Mortgage Corporation, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Court of Appeals for the Third Circuit's Judgment Order affirming the District Court's grant of summary judgment dismissing Petitioners' claims.

STATEMENT OF THE CASE.

The Atlantic Palace Condominium ("Atlantic Palace") is a high-rise (in excess of thirty stories) building located at New York Avenue and The Boardwalk in Atlantic City, New Jersey. Construction began on the Atlantic Palace in 1985 and was substantially completed in 1987. The owner and developer of the Atlantic Palace was Resort Development Corp. ("RDC"), who marketed and sold the 293 residential units in the Atlantic Palace as a condominium/ hotel.[1] Perini Corporation ("Perini") was the general contractor for the Atlantic Palace, and Stevens & Wilkinson, Inc. ("S&W") was the architect. The condominium is operated by the Atlantic Palace Condominium Association ("APCA") made up of

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[1] The Atlantic Palace also had a number of condominium units for commercial purposes.

all the owners of the condominium units, including Petitioners who purchased their units from RDC after construction of the Atlantic Palace was substantially complete.

Meridian was the construction lender for the Atlantic Palace. It did not market or sell the condominium units to Petitioners or to the public. After water infiltration and ventilation problems at the Atlantic Palace became apparent, Meridian began two actions in 1989. One action, Meridian Mortgage Corp. v. Perini Corp., et al., Civil Action No. 90-304 (D.N.J.), was against Perini and S&W, and the other, Meridian Mortgage Corp. v. Fidelity and Deposit Company of Maryland, et al., Civil Action No. 90-305 (D.N.J.), was against Perini's two bonding companies.[2] RDC also

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[2] Meridian's actions were originally filed in the United States District Court for the Eastern District of Pennsylvania and were transferred to the District of New Jersey.

filed an action against Perini, S&W and one of Perini's bonding companies, Resort Development Corp. v. Perini Corp., et al., Civil Action No. 89-4973 (D.N.J.).[3] Additionally, APCA filed an action against Perini and S&W, Atlantic Palace Condominium Association v. Perini Corp., et al., Civil Action No. 90-1003 (D.N.J.). All four actions sought damages for alleged negligence and breach of warranty in the design and construction of the Atlantic Palace.

On January 19, 1990, approximately 164 owners of individual condominium units at the Atlantic Palace, including Petitioners, Gaetano and Dorothy Miele, filed an action against Perini and S&W alleging negligence and breach of warranty in the design and

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[3] RDC's action was originally filed in the District of South Carolina and transferred to the District of New Jersey. RDC filed for bankruptcy in 1989 and did not actively participate in the litigation after its bankruptcy.

construction of the Atlantic Palace, Wright, et al. v. Perini Corp., et al., Civil Action No. 90-189 (D.N.J.).[4] Meridian was not named as a defendant in the Wright case but was added as a fourth party defendant by certain subcontractors who were joined as third party defendants by Perini or S&W. There were no fraud or misrepresentation claims, or claims under any federal statute, made in any pleadings in the Wright case or in any of the pleadings in the other consolidated cases. On April 26, 1990, the five cases relating to the Atlantic Palace and pending in the District of New Jersey were consolidated for case management and discovery purposes.

On October 24, 1990, Magistrate Judge Joel Rosen of the District of New Jersey granted to thirteen owners, including

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[4] The Mieles are identified as plaintiffs in the Wright caption and in Paragraph 12 of the Wright Complaint.

Petitioners James and Marguerite Cheripka, as well as Gaetano and Dorothy Miele, the right to intervene in the Wright action. On November 13, 1990, a separate intervention complaint was filed which mirrored the claims made in the Wright complaint. Counts I and II of the intervenor complaint alleged that Perini's construction of the Atlantic Palace was performed in a negligent manner, and that Perini negligently deviated from the construction contract, as well as from existing building and design standards. In Count III, the intervenors alleged that S&W failed to properly design and supervise the construction of the Atlantic Palace. In Counts IV and V, the intervenors contended that S&W breached its duty to supervise the construction of the work and failed to discover the defects in the contractors' work in a timely fashion. Count V stated

that S&W breached warranty claims under their contracts.[5]

Following the intervention order, the intervenors unsuccessfully attempted to amend their complaint to add new parties and additional claims. On May 28, 1991, Magistrate Judge Rosen denied the intervenors' motion to amend their Complaint to name additional parties and additional causes of action. Some four months later, intervenors again moved to amend their complaint, but that motion was also denied on September 25, 1991. Thereafter, intervenors moved to dismiss or withdraw their intervenor complaint. Magistrate Judge Rosen denied that motion on December 2, 1992. Petitioners failed to appeal those

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[5] The caption of the intervenor complaint is Portagallo, et al. v. Perini Corporation, et al., and even though it refers to the docket numbers of four of the five consolidated cases, the Magistrate Judge limited the intervention to the Wright case.

decisions to the Third Circuit, and they do not raise them in their Petition to this Court.

Following three days of court ordered mediation in July, 1992, all parties in the consolidated actions and all intervenors, except Petitioners, eventually agreed to settle all claims. The settlement was finalized on September 8, 1993, and included the creation of a fund of over $14,000,000 to repair the Atlantic Palace, as well as refinancing opportunities for mortgages on individual condominium units provided by Meridian.[6] As part of the settlement, all parties to the settlement released each other, except Meridian did not release unit owners in order to protect its mortgages on individual condominium units.

Rejecting the settlement, Petitioners proceeded with their action against Perini

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[6] Meridian did not contribute to the settlement fund.

and S&W. In scheduling orders issued by the Magistrate Judge (18A-22A), Petitioners were required to submit their experts' reports by July 1, 1991, and Perini and S&W were required to submit their experts' reports by October 1, 1991. Despite Petitioners' acknowledgement that their claims cannot be established without the aid of the liability, causation and damages issues expert testimony, they did not submit experts' reports.[7] See Appendix to Petition for Writ of Certiorari at p. 33A.

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[7] Petitioners' reference to the report of Zetlin-Argo on page 8 of the Petition is both misleading and misstated. Dr. Lev Zetlin, who died at the beginning of 1993, was hired by Meridian (not APCA) after litigation ensued to determine the cause of water infiltration and other defects and to testify at trial, after Perini, S&W and RDC had failed to identify the cause of the problems at the Atlantic Palace or to fix them after many attempts. The report encompasses six volumes, plus calculations and photographs, but Petitioners have supplied only a few pages in the Appendix. The Zetlin-Argo report does not identify Meridian as a cause of the defects.

On December 2 and 3, 1992, Perini and S&W, respectively, moved for summary judgment seeking to dismiss all claims asserted against them by Petitioners. Perini and S&W argued that the Petitioners' failure to proffer expert testimony was fatal to their negligence claims, therefore mandating their dismissal.[8]

On June 25, 1993, the Honorable Joseph E. Irenas, U.S.D.J., adopted Magistrate Judge Rosen's Report and Recommendation, and granted Perini and S&W's motions for summary judgment dismissing Petitioners' claim with prejudice. On December 1, 1993, the District Court, as a result of the settlement and summary judgment, entered final judgment dismissing all claims with

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[8] The District Court dismissed the breach of warranty claims as the Petitioners did not have a contractual relationship with Perini or S&W. Consequently, the District Court found that the contracts are only relevant insofar as any negligent deviation therefrom could be used to support Petitioners' negligence claims.

prejudice of all parties to the five consolidated actions. The Third Circuit affirmed the District Court by Judgment Order dated December 16, 1994.

SUMMARY OF THE ARGUMENT.

Petitioners had an opportunity to litigate the issues raised in the intervenor complaint but failed to present expert testimony to support their claims. On appeal and on this Petition, they have raised additional issues, not raised in the District Court or Third Circuit. They have presented no reasons why those issues should be heard by this Court.

REASONS WHY THE WRIT SHOULD BE DENIED.

I.

Neither The Decision Of The Court Of Appeals Or The District Court Nor The Record Raise The Questions Presented By This Petition.

It is the longstanding policy of this Court that "[w]here issues are neither raised before nor considered by the Court of Appeals, the [Supreme] Court will not ordinarily consider them." Adickes v. S.H. Kress and Co., 398 U.S. 144, 147 n.2, 90 S.Ct. 1598, 1602 n.2 (1970). It also seems clear that if an appellant lists an issue in the "Statement of Issues", and thereafter fails to pursue it in the "Argument", the Court of Appeals considers the point abandoned. Nagle v. Alspach, 8 F.3d 141, 143 (3d. 1993). Likewise, if an appellant fails to raise the issue in the "Statement of Issues", but argues the point in the body

of the brief it will be considered waived. See also Lunderstadt v. Colafella, 885 F.2d 66, 78 (3d Cir. 1989) (citing Fed. R. App. P. 28(a)(3) and (5), which require appellant's brief to contain a "statement of issues presented for review" and, in the argument, "the contentions of the appellant on the issues presented"); 16 Charles A. Wright, Federal Practice and Procedure § 3974, at 421 (1977 and Supp. 1994, at 690) (issue must be raised in both the "Issues" and the "Argument" sections of the brief); Accord Kost v. Kozakiewicz, 1 F.3d 176, 182-83 n.3 (3d Cir. 1992). Clearly, the Supreme Court will not consider issues which were not raised and determined in the Court of Appeals or District Court. Furthermore, Questions Presented but not argued or arguments not encompassed in the Questions Presented will not form the basis of the grant of a Writ of Certiorari.

Petitioners' Questions Nos. 1 and 2 involving the Interstate Land Sales Full Disclosure Act, 15 U.S.C. § 1701, et seq., and the federal criminal statute punishing mail fraud, 18 U.S.C. § 1341, were not raised to the Third Circuit. See the Supplemental Appendix attached to this Brief which is the Statement of Issues from Petitioners' Brief in the Third Circuit. Moreover, these statutes were not raised in the District Court or argued in the summary judgment proceeding. (Appendix to Petition for Writ of Certiorari at pp. 11A-40A.) As set forth in the Magistrate's Report and Recommendation, Petitioners' intervenor complaint alleged only claims based on negligence and breach of warranty against the architect (S&W) and the general contractor (Perini) of the Atlantic Palace. (Appendix to Petition for Writ of Certiorari at pp. 16A-17A.)

This Court has repeatedly declined to hear arguments which have been raised for the first time in a Petition for a Writ of Certiorari. See Granfinanciera, S.A. v. Nordberg, 492 U.S. 34, 39, 109 S.Ct. 2872, 2989 (1989) (the Court will not consider an argument resting on grounds which were not raised below barring exceptional circumstances); Price Waterhouse v. Hopkins, 490 U.S. 237, 240 n.5, 109 S.Ct. 1775, 1785 n.5 (1989) (the Court will not address an argument concerning a statutory violation because it was not made to the courts below); DeShaney v. Winnebago County DDS, 489 U.S. 193, 195 n.2, 109 S.Ct. 998, 1003 n.2, (1989) (the Court refused to consider argument that the Wisconsin Child Protection Statutes gave an abused child an "entitlement" to receive protective services in accordance with the terms of the statute because this argument was made for the first time in petitioner's brief to the Court.)

Even if Petitioners had presented their arguments about mail fraud violations pursuant to 18 U.S.C.A. § 1341, to the Third Circuit or the District Court, summary judgment would have still been granted because no private right of action exists for mail fraud under the federal statute. See Creech v. Federal Land Bank of Wichita, 647 F.Supp. 1097, 1099 (1986). Both cases relied on by Petitioners, United States v. Rendini, 738 F.2d 530 (1st Cir. 1984) and United States v. Amrep Corp., 560 F.2d 539 (2nd Cir. 1977), involved criminal prosecutions and do not provide any support to Petitioners' argument.

Similarly, Petitioners' argument under the Interstate Land Sales Full Disclosure Act must fail because Congress specifically exempted the sale or lease of improved land under § 1702:

> (a) Unless the method of disposition is adopted for the purpose of evasion of this chapter, the provisions of this chapter shall not apply to -
>
> * * * *
>
> (2) the sale or lease of any improved land on which there is a residential, commercial, condominium, or industrial building, or the sale or lease of land under a contract obligating the seller or lessor to erect such a building thereon within a period of two years.

In their Petition (p. 21), Petitioners admit that they purchased "furnished units in a vertical condominium." In the case relied on by Petitioners, Winter v. Hollingsworth Properties, Inc., 777 F.2d 1444, 1450 (11th Cir. 1985), the Court held that "[i]f at the time the purchaser signs the contract there exists a condominium building...the sale is exempt from the Act." Id. Thus, even if Petitioners had presented their argument concerning the Interstate Land Sales Full Disclosure Act to the Third Circuit or the District Court, summary judgment would still

have been granted because the Act was not applicable to this case.

II.

The Petition Fails To Raise Any Basis For Granting A Writ of Certiorari.

Even if the other "Questions Presented" and arguments were clear, consistent and raised in both the "Questions" and arguments, Petitioners fail to present any grounds for granting their Petition. First, Petitioners argue (pp. 24-26 of the Petition) that summary judgment was granted because they refused to join the settlement. The reasons why summary judgment was granted are fully set out in the Magistrate Judge's Report and Recommendation (pp. 11A-40A). There is nothing that says or suggests the grant of summary judgment was based on Petitioners' refusal to settle.

Second, Petitioners suggest that summary judgment was granted without

granting them a continuance (p. 26 of the Petition). They do not suggest what they would have done with the additional time. But at oral argument on the motion for summary judgment, Petitioners' counsel (Mr. Ferry) indicated that he had not attempted to retain an expert and had no present intention to do so. (Appendix to Petition at p. 22A.) Moreover, as the Magistrate Judge noted, Petitioners' counsel had failed to show "good cause", required by Rule 16(b), Fed.R.Civ.P., for a change in the scheduling order. (Appendix to Petition at p. 22A, n.5.) The simple truth is that Petitioners failed to ask for a continuance because they did not want one.

Third, Petitioners appear to argue that they did not need an expert because their case was brought for fraud and non-disclosure. It is clear from the Magistrate Judge's description of their intervenor complaint that Petitioners' claims did not

involve fraud or non-disclosure, but rather negligence and breach of warranty against the only defendants that they named, Perini and S&W.[9] (Appendix to Petition at pp. 16A-17.) Petitioners do not explain how they can prove negligence and breach of warranty in the construction of a high-rise building without an expert. Furthermore, such an issue in this diversity case is controlled by New Jersey state common law, and neither the constitution nor the laws of the United States are implicated.

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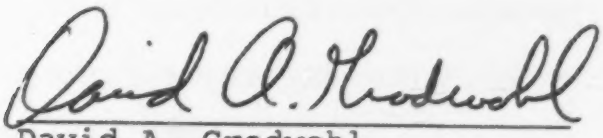
[9] Petitioners continue to refer to "defendants" in their Petition without fully explaining whom the "defendants" are other than Perini and S&W.

CONCLUSION.

For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,



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SUPPLEMENTAL APPENDIX

STATEMENT OF THE ISSUES

1. If defendants, including Perini as general contractor and Meridian as lead lender, had knowledge at the outset of construction defects and the existence of such defects and building violations was not disputed, should the cases of the plaintiff unit owners have been dismissed for an anticipated lack of additional expert testimony at the trial?

2. Where the essential element of the unit owners' cases was knowledge at the outset of the water infiltration and ventilation defects, and the principal theory of the pleadings was nondisclosure to and fraud on the purchasing unit owners, and the building violations existed in the non-settling plaintiffs' own units and were provable by ample fact witnesses and by admissions obtained in depositions of defendants' witnesses, was it appropriate for the trial court to grant summary judgment under FRCP 56 on defendants' motions?

3. Where plaintiff unit owners had found that the terms of a mediated settlement were not adequate to compensate for their losses, and were essentially defenseless by reason of their attorney's involvement in the settlement (in the interests of his settling clients), should the Court have imposed the drastic sanction of dismissal of the cases of the non-settling plaintiffs?

4. Where the non-settling plaintiffs' attorney in the trial court was faced with a conflict in respect of the responses of his 12

unit-owner clients to a mediated settlement proposal, should the Court have dealt with the practical problem presented by recognizing that the same attorney was unable under FRCP 56(f) to resist the defendants' motions for summary judgment or to present by affidavit facts essential to justify opposition to the motion? Should the Court under the circumstances presented by the conflict have ordered the attorney to withdraw and thereby have permitted the non-settling plaintiffs to defend against the defendants' summary judgment motions with new counsel?

STATEMENT OF THE CASE

Appellants are three condominium unit owners who purchased premises at the Atlantic Palace Condominium, located on the Boardwalk in Atlantic City. The Mieles purchased their unit #601 for $235,000 by deed dated February 12, 1988, at 34a. The Cheripkas purchased their unit #2910 for the sum of $172,000 by deed dated March 10, 1987. 33a. The Mieles obtained a purchase money mortgage from defendant, Meridian Mortgage Corp.; the Cheripkas obtained financing elsewhere.[1] The Hastings purchased Unit #2601 for $259,000.

The Mieles and the Cheripkas were part of a group of unit owners known as the "Portogallo group", consisting of a group of about 12 purchasers of individual units; the "Portogallo group" was represented by an Atlantic City attorney, Frank J. Ferry, Esq.

On April 11, 1990, Mr. Ferry filed a 17-count complaint in the Superior Court of New Jersey, Chancery Division, Atlantic County,

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1. Shortly prior to the filing of the notice of appeal, plaintiff James P. Cheripka died, survived by his wife. Marguerite Cheripka is also known as Marge Chips and she is referred to as such in the appendix.